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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONID ALEX SHNEYDER,

Defendant and Appellant.

D073716

(Super. Ct. No. SCD206601)

APPEAL from an order of the Superior Court of San Diego County, Maureen F. Hallahan, Judge. Affirmed.

Kristen Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General and Eric A. Swenson, Deputy Attorney General, for Plaintiff and Respondent.

Leonid Alex Shneyder appeals from the denial of his fourth motion to reduce his felony child pornography conviction to a misdemeanor under Penal Code<sup>1</sup> section 17, subdivision (b). Defendant contends the trial court abused its discretion in denying his motion because of claimed factual errors in the materials presented to previous judges, and his contention the court merely relied on the decisions of previous judges. Our review of the record makes clear the trial court was well informed on the issue before it and acted within its broad discretionary authority in denying defendant's latest motion. We will affirm the order.

#### FACTS AND PROCEDURAL BACKGROUND

In 2008, defendant pleaded guilty to one count of possession of child pornography (§ 311.11, subd. (a)). In exchange for his plea the remaining six counts were dismissed with a "*Harvey* waiver."<sup>2</sup>

Defendant filed his first motion to reduce the conviction to a misdemeanor in October 2011. The trial court denied the motion. The second motion was filed in May 2017. The motion was again denied by the trial court. Defendant's third motion, filed in September 2017, was taken off calendar when an adverse ruling seemed likely.

The fourth motion, which is the subject of this appeal, was filed in December 2017. The motion argued the court's prior decisions were the result of material misrepresentations as to the quantity of pornographic materials found on defendant's

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

computer and backup DVD. The court reviewed all the present and prior pleadings and again found the conduct warranted a felony conviction. The court denied the motion.

The factual background underlying the procedural issues here is well summarized in the Respondent's brief. We will include it here for convenience.

Defendant took his laptop to Best Buy to have his files saved on a backup DVD. On March 2, 2007, while the backup was in progress, a technician noticed a thumbnail image showing two children in the presence of an adult's penis. The technician stopped the process, returned the laptop to defendant, and told him that his request for service could not be completed. Best Buy gave the police the DVD containing the partial backup from defendant's laptop.

An investigator reviewed the DVD and found it contained over 100 video clips, all of which were labeled with terms commonly associated with child pornography. The investigator viewed several of the video clips and "found them to depict prepubescent and pubescent children, in various stages of nudity, engaged in sex acts with adult males, females, and other children. The sex acts included oral copulation, masturbation, sodomy, and digital as well as penile penetration of the children's vaginas."

Nearly six weeks later, on May 14, 2007, police searched defendant's residence and seized his laptop. An evaluation of the laptop located 11 images, four complete videos, and 58 "preview" videos of child pornography. A "preview" video was created each time defendant checked the status of a download as it was in progress, resulting in a clip of the video being saved to his computer. Of the 62 videos found, 12 of the videos were viewed and documented by the investigator. The videos ranged from 10 seconds to

10 minutes long and involved children ranging from approximately four years old to teenagers engaging in various sex acts with adults and other children.

Defendant admitted he downloaded child pornography and stated he regularly deleted the files he downloaded several times a week. Defendant was unaware that the images and videos were still on his laptop when he took it in for servicing.

## DISCUSSION

### A. Legal Principles

Defendant's conviction is for an offense that is a so-called "wobbler," it is punishable as either a felony or a misdemeanor in the discretion of the trial court. (*People v. Park* (2013) 56 Cal.4th 782, 789.) We review the trial court's sentencing decisions under the abuse of discretion standard. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974.) We will only overturn such decisions where there is a clear showing of abuse of discretion. (*People v. Sy* (2014) 223 Cal.App.4th 44, 66; *Alvarez*, at pp. 977-978.)

### B. Analysis

At the fourth motion hearing, defense counsel continued to argue there had been a misrepresentation as to the quantity of child pornography defendant possessed. Counsel argued the two judges who had ruled in the previous motions had been misinformed. Counsel asked the court to consider the defense motion. The court responded:

"Thank you. And I went back and read the pleadings before Judge Lasater<sup>3</sup> and read the description of some of the video clips with

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<sup>3</sup> Judge Lasater was mistakenly referred to in the briefs as Judge Lancaster.

respect to the content of those clips. So I did not only read what you wrote, I read the other previous motions." The court continued: "Okay. I agree [with the prosecutor's comments]. It was felonious conduct and I believe that this is not a case that should be reduced to a misdemeanor. So your 17(b) motion is denied."

Admittedly there has been some confusion in the record as to the volume of child pornography in defendant's possession. The partial backup DVD provided to investigators by Best Buy had approximately 100 video clips. When a search warrant was executed some six weeks later defendant's computer contained four complete videos and 58 thumbnail videos containing child pornography. The trial judge was clearly aware of the history of this case. Even if there were "only" 58 clips and four complete videos, the court found such conduct to be felonious and not worthy of reduction.

It is clear the court was not misinformed and made its own decision, not relying on the decisions of prior judges. We are satisfied that reasonable trial court judges could view defendant's possession of child pornography to be sufficiently egregious to warrant a felony conviction. Whether defendant possessed 100 or 62 items of child pornography, a reasonable trial court could reach the conclusion such conduct did not warrant reduction of the level of his conviction. There was no abuse of discretion.

DISPOSITION

The order denying the motion to reduce the offense under section 17,  
subdivision (b) is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.